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**APPELLATE COURT**  
OF THE  
**STATE OF CONNECTICUT**

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JUDICIAL DISTRICT OF NEW BRITAIN

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**A.C. 39881**

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**AUSTIN HAUGHWOUT**

v.

**LAURA TORDENTI ET AL.**

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REPLY BRIEF OF THE PLAINTIFF-APPELLANT

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## **ARGUMENT**

The Court should not allow, “If you see something, say something” to devolve into a de facto censorship board.

### **I. “WOULD BELIEVE” AND IMPRECISIONS IN THE SCHOOL’S BRIEF**

#### **A. On the Law**

The most important part of the school’s brief is on page 4. The school states the standard clearly: “In other words, the issue is whether a reasonable hearer or receiver of the expressive conduct would believe the communicator was expressing a serious intent to commit an act of unlawful violence.” School Brief 4.

**Would.** Not might. Not may. Not possibly so. Most definitely not could. “Would” is a strict standard. “Would” means that the facts must point us to an ineluctable, unambiguous conclusion. Joking doesn’t cut it. Maybe doesn’t cut it. Hmm doesn’t cut it. Looking at the primary evidence underlying the school’s case—the police reports at the start of appendix two—“would believe” just is not there, on these facts.

The school employs a number of rhetorical flourishes to bolster its argument. Although surely made with a good faith intent to persuade, some of the imprecisions would be dangerous if adopted by the Court at face value. For example, on page 13 of its brief, the school elides the strict standard of “would” into “might well”; on page 10, “would” becomes “may well” and “partially conflicted.” It’s understandable language play, but it also dilutes the law.

The school also seems to get some of the law a bit wrong. Take the matter of imminence, for example. At the bottom of page 11 to the top of page 12, the school says the “Court need not address that issue.” The school cites a portion of *State v. DeLoreto*,

265 Conn. 145, 158 (2003) in support, as well as some other cases, claiming that imminence isn't relevant. This misses the mark. Imminence is cited in the standard in a number of cases, including 2014's *State v. Krijger*, 313 Conn. 434, 450 (2014). It's just that imminence is not a per se requirement. Not all true threats have imminence, but it's certainly a factor the Court needs to consider.

What does "imminence" mean? The school seems to equate imminence with immediacy, but they aren't the same. It is useful to remember the history of the speech exception here. The true threat exception—as with the incitement exception, as with the fighting words exception, as with the sedition exception—these are all variations of the old "clear and present danger" test, adjusted to particular factual scenarios. The underlying theory is the same, though. The clear and present danger test was a "question of proximity and degree." *Schenck v. United States*, 249 U.S. 47 (1919). A highly probable evil allowed more government flexibility, where a more remote one restricted government action. The test fell out of favor because it was too subjective, starting with the change in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). But the theory underlying modern exceptions is the same. Imminence is more about certitude—imminence is one of the things that has a relationship to that "would believe" discussed above. That imminence is not here is relevant to the Court's analysis because it suggests the language is not a true threat.

## **B. On the Facts**

The school also gets a bit loose with the facts—again, probably as a well-intended rhetorical flourish. For example, at one point, the school claims that "the record is devoid of any evidence that Mr. Haughwout's comments and gestures were ever part of any debate or discussion of Second Amendment gun rights or the public issue of gun control more

generally . . . .”

Surely the school’s claim is hyperbolic—the school can’t mean *any* evidence. Surely the school means it doesn’t like the evidence or believes it is wanting. In his principal brief, the college student identified several facts in a police report; A2.172 (“mentioned it may have to do with his position on gun rights”) (“very knowledgeable . . . can engage anyone in conversation about most subjects including guns”); and the expulsion hearing; A2.215 (substantive discussion concerning issue), A2.220 (“I’ve talked with him multiple times about, you know, gun laws and politics of guns and, you know, that kind of stuff. You know, just discussing the law behind guns.”), A2.221 (“I constantly am able to debate politics with him . . . there’s a difference between our views of both gun control, as well as, you know, other aspects”) A2.221–22 (“he’s doing this because he doesn’t like my personal viewpoint on whether it be gun control or another topic”), A2.222 (“I’m more political than most people, so I’m frequently bringing politics”), *id.* (“gun control because, you know, that’s one of my hobbies”), A2.231 (noting discussions between college student and Mr. Hazan concerning “gun control or politics about guns or the lawful use of firearms”). There was also evidence adduced in court; A2.231 (noting student in police report was “more in favor of very strict gun laws and he was aware that I [the college student] was in favor of firearms rights”). A bit of hyperbole from the school is appropriate for zealous advocacy, but the college student hopes the Court will not just take assertions like this at face value.

A similar bit of slippage is in changing singulars to plurals. For instance, the school claims “some” students discontinued going to the student center because of the college student’s speech. There is evidence that **one** student discontinued going to the center. It’s in the September 15, 2015 police report, first paragraph on A2.171. That’s the only

evidence anyone stopped going to the center because of the college student's language. But this one student becomes "some" in the school's brief. To be fair, this isn't entirely the school's fault—the trial court shares some blame. The trial court indicates that "at least some of [the students] who heard these threats were 'alarmed' and 'concerned' about them and in some cases changed their behavior; e.g., coming less often to the student center because of Mr. Haughwout's statements." A.146. It is possible to read the trial the final clause as applying to multiple students or to a single student.

Another way the school is a bit loose with facts is in editorializing them—sometimes this editorializing imputes a state of mind that isn't in the record. For instance, the college student's actions are narrated as having a "grim coldness evocative of a well formed intent . . . ." School Brief 9. It is understandable why the school would frame the issue in such a way. The actual record is not so dramatic. It's rather plain.

This kind of rhetorical trope is not unique, though sometimes the adjustment is subtler. For instance, on page 10 of its brief, the school quickly rehashes facts concerning students. The school indicates that a student was "alarmed" and "felt afraid for everyone's safety." The school then goes on to critique the college student's position that the statements were understood to be made jokingly.

See, the way the school mounts its argument suggests the student who "felt afraid" was different from the students who understood the college student's remarks as being made jokingly. In fact, they are the same, though—the student who indicated he "felt afraid for everyone's safety" also indicated he understood the statements to be made jokingly, in his second interview with police. This is all in the police reports at the start of appendix two. The way the school presents facts can give a false impression vis-à-vis what is

actually in the police reports, and the college student hopes the Court will review such representations mindfully.

With respect to both the facts and the law, there are a number of other similar moments in the school's brief. It seems petty to run through them all seriatim—the school is just employing the tools of rhetoric. So the college student points out these few examples for the sake of prudence concerning the remainder.

## **II. A WELCOME CORRECTION**

The college student welcomes the school's correction in note 1 on page 2. The college student agrees that this is not an administrative appeal pursuant to the administrative procedures act. This appeal challenges a determination by an administrative body, attacking on constitutional grounds rather than through the administrative procedures act.

In addition to what the school indicates, the college student notes also that the parallel case of HHB-CV-15501709-S was also dismissed due to inadequate service pursuant to Practice Book § 10-30(a)(4), also on February 8, 2016.

## **III. THE INCLUSION OF *TINKER* AND DUE PROCESS IS CONFUSING**

On pages 5 and 6, the school presents a policy argument and advocates for a novel change in the law, citing *Tinker* and its progeny. The college student addresses these each in turn.

First, the school cites a number of opinions quoting language from a mélange of cases around *Tinker v. Des Moines*. In terms of policy, *Tinker* offers some pleasant language both sides may draw on, but *Tinker* isn't useful legally in this context. Usually *Tinker* is employed in cases involving secondary school students. Under *Tinker* and its

progeny, high school administrators sometimes can enjoy more deference in terms of how they operate, at least as compared to government agencies interacting with general public.

The United States Supreme Court, however, has expressly declined to address whether the somewhat more relaxed *Tinker* standard applies to college and university administrators. See *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273, 108 S. Ct. 562 (1988) (“We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.”). Dicta strongly suggests the *Tinker* standard probably does not apply in the college or university setting:

“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, [f]irst [a]mendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, [t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . . The college classroom with its surrounding environs is peculiarly the marketplace of ideas . . . .

*Healy v. James*, 408 U.S. 169, 180–81, 92 S. Ct. 2338 (1972). The general view is that *Tinker* does not apply to college students. It is not clear why the school brings it up.

In Footnote 3 on page 6, the school suggests the Court should afford the same kind of deference in the present first amendment case as is afforded to schools in Due Process cases. The school brands this deference as “flexibility.” It is not clear how this is rooted in any first amendment jurisprudence, where the presumption is that speech is protected, and state action receives the strongest scrutiny in American jurisprudence, demanding the least speech restrictive alternative absolutely necessary to obtain a compelling government interest. Or is the school asking for a new speech exception? It is not clear to the college student what this portion of the school’s brief is all about.

#### **IV. KRIJGER ANALYSIS**

The school does not engage the meat of the argument in the principal brief concerning *Krijger*: that the language in *Krijger* similarly *could* be construed as a threat, but a benign interpretation was more plausible. The school claims *Krijger* is of limited applicability because it is distinguishable, identifying some facts but avoiding the legal analysis. With respect to the facts, the school points out that conduct in the present case occurred over time. The school simultaneously ignores, however, the fact that the relationship in *Krijger* had been expressly acrimonious for a long time. In contrast, in the present case, the initial complainant indicated he did not know the college student well and the others seemed to be at least cordial acquaintances.

#### **V. AS CONCERNS “IGNORING CERTAIN EVIDENCE” OR “EMBELLISHING”**

On page 8 of its brief, the school claims the college student “ignores certain compelling evidence and embellishes or misconstrues other evidence.” School Brief 8. The school repeats the claim throughout at various points, insisting that the college student’s position is devoid of factual support.

With respect to “ignoring certain compelling evidence,” the college student points out that he addressed that evidence that the trial court relied on concerning true threats. In his principal brief, the college student did so in two ways: first on the whole, as a totality; and then again with special granularity as to each piece of evidence relied upon.

With respect to “embellishing,” the college student points out that sources are well cited in the principal brief. Notwithstanding the school’s claim, the college students stands on his principal brief.

## **VI. THIS IS DE NOVO REVIEW**

Repeatedly, the school tries to frame the issue as a factual one, rather than a matter of law. See, e.g., School's Brief 14–15. This is probably to enjoy the deferential standard of review for factual determinations.

Throughout Anglo-American jurisprudence, the meaning of language is traditionally a question of law, not of fact. The construction of language is reviewed de novo because a trial court is in no better position than a reviewing court to make a determination as to meaning of language. Accordingly, whether an utterance is a true threat is a question of law, reviewed de novo, and the issue in the present case is as well.

In contrast, intent must be a factual determination. A trial court is in a superbly better position than a reviewing court to determine that fact. The trial court views the evidence directly and in context. In the present case, however, the trial court stresses that it believed intent was not relevant. Accordingly, the opinion does not rely on such a factual determination.

The school tries to recast the college student's arguments as factual. The Court should not be misled. The college student focused in his principal brief not on his subjective intent, but gave due attention to how his language and gestures were received by contemporaneous listeners: jokingly. In the police reports, listeners invariably understood the language as being made jokingly. These facts in the record are material to the totality analysis. The standard of review in the present case is de novo, notwithstanding the school's hints to the contrary.

## **VII. REPLY TO THE CLAIM THAT INTENT IS NOT RELEVANT, PAGES 14–15**

The school claims that subjective intent is not a requirement for the true threat

exception. Intent to actually cause harm obviously is not a requirement; but whether a speaker must intend to speak threateningly, that is not settled. The college student specifically hoped to avoid this issue; see Principal Brief, note 7 at page 8–9. Because the school has pressed the issue, however, the college student now must address the matter by way of reply.

**Novel question:** This is an issue of first impression. Ordinarily, the issue of true threats is litigated in the criminal context. Because nearly all criminal statutes have a mens rea requirement, reviewing courts usually don't have to reach the constitutional question concerning the freedom of speech in the true threat context. A mens rea requirement is written into the statute, so why reach some constitutional question of scienter?

Almost half a century after the seminal *Watts v. United States*, 394 U.S. 705, 89 S.Ct. 1399 (1969), the United States Supreme Court still hasn't addressed this question. Just a few years ago, the Court declined to do so, yet again. *Elonis v. United States*, 135 S.Ct. 2001, 2012 (2015) ("Given our disposition, it is not necessary to consider any [f]irst [a]mendment issues"); see also *id.*, 2013 (listing slew of cases where Supreme Court avoided issue). So the legal question of whether the true threat exception has a scienter requirement is a novel one.

Although not settled law, there is an implied scienter requirement. The true threat exception requires a subjective intent of at least speaking with reckless disregard that others may construe the speaker's communication as a true threat. This is contrary to the trial court's holding and provides ground to reverse and remand. Even if this is not true under the federal constitution, it is true under the Connecticut constitution in accordance with the six factors under *State v. Geisler*, 222 Conn. 672 (1992).

**Text, substance:** In terms of text in the state Constitution, the college student directs the Court's attention particularly to Article I, § 5: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press." This is in addition to the mandate in § 4 that "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty." The college student notes that "effect must be given to every part of and each word in the constitution" and that "reading them to have identical meanings would render one of them a nullity." *State v. Geisler*, 222 Conn. 672, 685 (1992).

As concerns this issue, the most important word in § 5 is "ever." As our Supreme Court noted in *State v. Linares*, 232 Conn. 345 (1995), the word is absent from the first amendment and gives section 5 more force than its federal counterpart. This is a message in a bottle from 1818 telling us, "Look, you have to be more thorough in Connecticut than about that federal amendment they passed in 1789. It's vital to never get this wrong."

In this context, "ever" indicates a specially searching scrutiny of any laws that could possibly curtail the liberty of speech. That thoroughness is best reflected in a subjective intent analysis. Anything short of a subjective analysis may inadvertently and impermissibly cut back on the liberty—"curtail" it.

**Text, structure:** As a matter of structure in the text, the college student notes that § 5 limits the responsibility portion of § 4. Section 4 is a freedom-responsibility clause, common in state constitutions and the Declaration of Rights Man and of the Citizen. This language was construed by William Bristol in 1818 as an absolute freedom from prior restraints. See *Cologne v. Westfarms Associates*, 192 Conn. 48, 63 n.9 (1984) (section 4 ensures "every thing may go out, which the citizen chooses to publish"). Section 5, then,

qualifies how the state may hold individuals responsible for abuses. That is, yes, individuals can be held accountable for abuses of the liberty of speech, so long as no law shall ever be passed to impermissibly curtail that freedom. Whereas § 4 forbids prior restraints, § 5 limits post-speech punishments, such as an expulsion.

**History and tradition:** In terms of history and tradition, historically there has always been, de facto, a scienter requirement for the true threat exception. This because the true threat exception is almost always litigated in the criminal context where the state must establish the mens rea requirement.

**Holdings and dicta, freedom of speech:** In terms of holdings and dicta, there are two sets of authority. The first set indicates that one cannot *negligently* go beyond the bounds of first amendment protections, nor do so with strict liability. For example, in *State v. Indrisano*, Our Supreme Court limited the mens rea of the disorderly conduct statute in order to save it from being impermissibly vague in the first amendment context. The gloss added to the statute was: “in order to support a conviction for disorderly conduct, the defendant’s predominant intent must be to cause inconvenience, annoyance, or alarm, rather than to exercise his constitutional rights.” *State v. Indrisano*, 228 Conn. 795, 809, 640 A.2d 986 (1994). In other words, a special scienter requirement was imposed to harmonize the statute with protections for the liberty of speech.

We see a similar requirement in the speech-tort context. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80, 84 S. Ct. 710 (1964) imposed the scienter requirement of actual malice in many defamation contexts. Indeed, the first amendment precludes strict liability in the defamation context. See *Gleason v. Smolinski*, 319 Conn. 394, 442–43, 125 A.3d 920, 955 (2015) concerning *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346–49, 94 S.

Ct. 2997 (1974). A recklessness scienter requirement has been repeated and broadened in the false light invasion of privacy context. *Honan v. Dimyan*, 52 Conn. App. 123, 132–33, 726 A.2d 613 (1999) (noting recklessness scienter requirement). Accordingly, precedent indicates a scienter requirement for similar speech exceptions—that one cannot just accidentally slip into a speech exception.

**Holdings and dicta, preference for subjective analyses:** The second set of authority is that the state constitution esteems subjective, tailored justice. In a multitude of controversies, our state constitutional jurisprudence adopts fact-specific, subjective inquiries rather than simple objective rules. See, e.g., *State v. Morales*, 232 Conn. 707, 711, 657 A.2d 585 (1995) (adopting subjective multifactor test in evidence despoliation context); *State v. Linares*, *supra*, 232 Conn. 377–87 (adopting subjective fact-specific test for forum analysis in free speech context); *State v. Barton*, 219 Conn. 529, 543–44, 594 A.2d 917 (1991) (adopting totality of the circumstances test for probable cause, rejecting objective federal two-prong test); *State v. Golding*, 213 Conn. 233, 239–40, 567 A.2d 823, (1989) (adopting subjective multifactor test for review of unpreserved constitutional claims, rejecting objective “pure plain error standard”); see also *United Food & Commercial Workers Union v. Crystal Mall Assoc., L.P.*, 270 Conn. 261, 286–91, 852 A.2d 659 (2004) (discussing subjective multifactor test for state action doctrine and applying it *arguendo* over objective federal equivalent); *Office of Governor v. Select Committee of Inquiry*, 271 Conn. 540, 578, 858 A.2d 709 (2004); *Seymour v. Board of Education*, 261 Conn. 475, 803 A.2d 318 (2002) (political question doctrine determined on subjective case-by-case basis); *Cologne v. Westfarms Associates*, 192 Conn. 48, 82, 469 A.2d 1201 (1984) (Peters, J. dissenting) (state constitutional standard should be more flexible than federal counterpart

because there is no federalism interest). As applied here, that preference for subjective justice in our state Constitution indicates a subjective and objective test—an inquiry to the liberty of speech via the scienter of the speaker, as well as the objective test concerning the effect on a reasonable listener.

**Federal precedent, sibling states:** At the U.S. Supreme Court level, precedent is bare. Elsewhere, the cases are in considerable disarray. The college student's research suggests that the issue doesn't come up regularly outside of the criminal context.

**Socio-economic, policy concerns:** There are three points here. First, whereas first amendment freedoms may be occasionally dimmed in light of a federalism interest, there is no such interest here.

Second, with a merely objective test, speech endorsing certain unpopular views can be construed as unreasonable speech. How can we improve sexual harassment policies if we are afraid of creating a hostile work environment by critiquing them? How can we improve gun policy if we are afraid of having critiques construed as threats?

Third, who owns the liberty of speech, really? In Connecticut, we don't protect only the (wonderfully) articulate discourse of high school debate teams or NPR or policy reports. People in ivory towers own the liberty of speech, but so do folks from Uncasville and Clinton and Colebrook and Litchfield and Preston and Sharon. We don't just protect jokes we think are funny. We don't have a reasonableness test for the freedom of speech. This isn't our way. They have a reasonableness requirement for the liberty of speech in Canada. They have one in many European democracies. But this isn't our way.

We don't just protect speech from government interference. We protect it from the mere *threat* of government interference, the possibility, because just the possibility frightens

people and harms the marketplace of ideas. To these ends, our Constitution demands a subjective scienter requirement to ensure an individual cannot accidentally, inadvertently abandon the bulwark of the liberty of speech.

### **CONCLUSION**

Because the statements, gestures, and images are not true threats, they constitute the free exercise of the liberty of speech and of the press. Accordingly, the statements, gestures, and images fall within the aegis of the first amendment. The student was expelled for making these statements. Because the state government and its instruments do not have the power to punish someone for making protected statements, the Court should reverse the judgment of the trial court with direction to enter an injunction reinstating the college student at the school and expunging his disciplinary record there.

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## **CERTIFICATIONS**

This brief and attached appendices are identical to the electronic copies of the same contemporaneously submitted electronically through the State of Connecticut Judicial Branch eservices in accordance with Practice Book § 67-2(g). In compliance with Practice Book § 67-2(g), the electronically submitted brief has been or shall immediately be delivered to the counsel of record at their last known email addresses on the 1st day of February, 2018. The brief and appendices do not contain names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law. The brief and appendices are in compliance with the formatting requirements of Practice Book §§ 67-1 & 67-2.

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Furthermore, in compliance with § 67-2(i)(1), a physical copy of the brief and appendices of the petitioner-appellant Austin Haughwout has been or shall immediately be sent to each counsel of record and to the trial judge who rendered the judgment that is the subject matter of the appeal, by first class mail, postage prepaid on the 1st day of February, 2018:

The Honorable Joseph M. Shortall  
Judge Trial Referee  
Judicial District of New Britain  
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Pursuant to §§67-2(i)(2), (3), and (4), the brief and appendices filed with the Appellate Clerk are true copies of the brief and appendices submitted electronically in accordance with § 67-2(g); the brief and appendices do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law; the brief and appendices comply with all provisions of § 67-2.

/s/ Mario Cerame 433928  
Mario Cerame